

September 1994

Secondhand Smoke as an Issue in Child Custody/Visitation Disputes

Jeffrey L. Hall

Family Law Master, State of West Virginia

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Family Law Commons](#), and the [Substance Abuse and Addiction Commons](#)

Recommended Citation

Jeffrey L. Hall, *Secondhand Smoke as an Issue in Child Custody/Visitation Disputes*, 97 W. Va. L. Rev. (1994).

Available at: <https://researchrepository.wvu.edu/wvlr/vol97/iss1/6>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

SECONDHAND SMOKE AS AN ISSUE IN CHILD CUSTODY/VISITATION DISPUTES

JEFFREY L. HALL*

I.	INTRODUCTION	115
II.	HEALTH IMPACT OF SECONDHAND SMOKE	117
III.	PROTECTIONS EXTENDED TO ADULT NONSMOKERS	121
	A. <i>Inmate Claims</i>	121
	B. <i>Employee Workplace Claims</i>	123
	C. <i>Legislation</i>	125
IV.	CHILD CUSTODY/VISITATION CASES	127
V.	ANALYSIS OF THE SECONDHAND SMOKE ISSUE UNDER WEST VIRGINIA LAW	132
VI.	CONCLUSION	138

I. INTRODUCTION

Children with parents who smoke in their presence generally have no choice but to suffer in their parents' chosen smoke-filled environment. It is in such an environment that, as long as the family unit remains intact, courts and legislatures refuse to intervene, despite well documented evidence of the dangers of secondhand smoke¹ as it par-

* Family Law Master, State of West Virginia, Region 11; B.A., Youngstown State University, 1983; J.D., The University of Akron School of Law, 1986; Admitted to W. Va. State Bar, 1986.

1. Secondhand smoke is also referred to as passive smoke, secondary smoke, involuntary smoke, and environmental tobacco smoke (ETS). Secondhand smoke occurs where non-smokers involuntarily inhale tobacco smoke in enclosed environments, either by inhaling that smoke directly exhaled by smokers (known as mainstream smoke) or by inhaling that smoke from the burning end of a cigarette, cigar, or pipe (known as sidestream smoke). See Bradley M. Soos, *Adding Smoke to the Cloud of Tobacco Litigation — A New Plaintiff: The Involuntary Smoker*, 23 Val. U. L. Rev. 111 (1988).

ticularly affects young children.² Upon divorce, however, the state can intervene, and courts across the United States have been increasingly called upon to determine whether parents legally can choose to subject their children to secondhand smoke.

Although certain courts³ and state and federal governments⁴ have extended protections to adult nonsmokers in areas outside the home, judicial opinions in the context of child custody and visitation disputes have considered the impact of secondhand smoke on minor children only as one of many factors in the parental fitness/best interest decision-making process,⁵ rather than as the single determinative factor in the dispute. This article will consider whether a child's exposure to secondhand smoke should be a determinative factor in custody and visitation cases, and whether courts should view such exposure as central to parental fitness, or merely as one of many factors in the best interests paradigm.

Before addressing the issue of secondhand smoke in child custody and visitation disputes, Part II of this article will briefly review the medical and scientific studies and commentary documenting the adverse health effects of secondhand smoke, with a particular emphasis on its impact on children. Part III of this article will then also briefly explore the legislative and judicial experience with claims for protection asserted by adult nonsmokers involuntarily exposed to secondhand smoke outside the family law area.

Against this backdrop of the documented dangers of secondhand smoke to children and the experience of the claims of adult nonsmokers, Part IV of this article will then focus upon family law decisions

2. See *infra* notes 6-24 and accompanying text.

3. See *infra* notes 25-47 and accompanying text.

4. See *infra* notes 48-57 and accompanying text.

5. See, e.g., *De Beni Souza v. Kallweit*, 16 Fam. L. Rep. (BNA) 1496 (Cal. Super. Ct. July 12, 1990); *Badeaux v. Badeauz*, 541 So. 2d 301 (La. Ct. App. 1989); *Lamacchia v. Lamacchia*, No. B89-2922 (Mass. Prob. & Fam. Ct. Dec. 19, 1991); *Satalino v. Satalino*, No. 11440-86 (N.Y. Sup. Ct. Oct. 10, 1990); *Roofeh v. Roofeh*, 525 N.Y.S.2d 765 (Sup. Ct. 1988); *Pizzitola v. Pizzitola* 748 S.W.2d 568 (Tex. Ct. App. 1988). See also *infra* notes 58-88 and accompanying text. See generally, Wanda Uhlich, Note, *Best Interests of the Child: Considering the Effects of Passive Smoking When Making a Child Custody Adjudication*, N.D. L. Rev. 727, 745-747 (1992) [hereinafter Uhlich].

dealing with the secondhand smoke issue. Finally, Part V of this article will then suggest a likely resolution of the issue under current pronouncements by the Supreme Court of Appeals of West Virginia regarding parental fitness and the best interest of the child.

II. HEALTH IMPACT OF SECONDHAND SMOKE

As early as 1964, federal government agencies began reporting the medical and scientific evidence that smoking caused lung cancer, heart disease, bronchitis, emphysema, and other respiratory disorders.⁶ An avalanche of additional government studies confirmed the government's initial findings.⁷ Beginning in the mid-1980s, the government produced additional studies linking secondhand smoke to several ailments experienced by nonsmokers,⁸ and an abundance of medical and legal commentary followed.⁹ Recently, in 1993, the Environmental Protection Agency confirmed the link between secondhand smoke and lung cancer, heart disorders, and other life threatening illnesses found in nonsmokers.¹⁰

6. See Public Health Service, U.S. Dep't of Health, Educ. & Welfare, *Smoking and Health* 33 (1964).

7. See, e.g., Public Health Service, U.S. Dep't of Health, Educ. & Welfare, *The Consequences of Smoking: A Report of the Surgeon General* 117-35 (1972); PUBLIC HEALTH SERVICE, U. S. DEP'T OF HEALTH, EDUC. & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT TO THE SURGEON GENERAL* (1975); PUBLIC HEALTH SERVICE, U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, *SMOKING AND HEALTH* vii (1979).

8. See, e.g., *Assessment of Lung Cancer in Adults and Respiratory Disorders in Children* (External Draft), 55 Fed. Reg. 25, 874 (1990); Comm. on Passive Smoking, National Research Council, *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects* (1986); PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH & HUMAN SERV., *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL* (1986) [hereinafter *SURGEON GENERAL REPORT*].

9. See, e.g., David B. Ezra, Note, *Smoker Battery: An Antidote to Secondhand Smoke*, 63 S. Cal. L. Rev. 1061 (1990); Jonathan E. Fielding & Kenneth J. Phenow, *Health Effects of Involuntary Smoking*, 319 NEW ENG. J. MED. 1452 (1988); William K. Grisham, Jr., *Passive Smoking: Are We Our Brother's Keeper*, 13 AM. J. TRIAL ADVOC. 901 (1990); Thomas P. Houston, *The Silent Killer: Environmental Tobacco Smoke*, 32 J. FAM. PRAC. 457 (1991); Dwight T. Janerich, *Lung Cancer and Exposure to Tobacco Smoke in the Household*, 323 NEW ENG. J. MED. 632 (1990) [hereinafter *Janerich*]; Dale P. Sandler et al., *Death from All Causes in Nonsmokers Who Lived with Smokers*, 79 AM. J. PUB. HEALTH 163 (1989); Kyle Steenland, *Passive Smoking and the Risk of Heart Disease*, 267 JAMA 94 (1992).

10. U.S. Environmental Protection Agency, *Respiratory Health Effects of Passive*

These same studies also established that children raised in homes with smokers are particularly susceptible to health problems linked with secondhand smoke, predominantly respiratory disorders.¹¹ The 1986 Surgeon General's Report stated that children whose parents smoke are more likely to suffer from bronchitis or pneumonia during their first year of life, more likely to suffer from various respiratory illnesses and infections including tracheitis and laryngitis, and more likely to suffer from chronic coughs.¹²

Dr. William Cahan, pulmonary surgeon emeritus at Memorial Sloan-Kettering Cancer Center in New York City, testified in a child custody case that children's cells are more susceptible to cancer-causing agents found in secondhand smoke because children's tissues are developing.¹³ Dr. Cahan stated that, "[c]hildren exposed to substantial amounts of smoke in the home suffer more respiratory and ear,¹⁴ nose, and throat¹⁵ problems than other children and are more likely to develop lung cancer later in life."¹⁶ Dr. Cahan compared returning a

Smoking: Lung Cancer and Other Disorders (1993).

11. See Surgeon General Report, *supra* note 8, at 7. For a review of medical studies related to secondhand smoke and asthma in children, see F.D. Martinez et al., *Increased Incidence of Asthma in Children of Smoking Mothers*, 89 PEDIATRICS 21, 21-26 (1992). On the issue of secondhand smoke and cough, phlegm, and wheezing in children, see J.R.T. Colley, *Respiratory Symptoms in Children and Parental Smoking and Phlegm Production*, 2 BRIT. MED. J. 210, 210-14 (1974); David R. Neuspiel et al., *Parental Smoking and Post Infancy Wheezing in Children: A Prospective Cohort Study*, 79 AM. J. PUB. HEALTH 168, 168-71 (1989). See also F.A. Pedreira et al., *Involuntary Smoking and Incidence of Respiratory Illness During the First Year of Life*, 75 PEDIATRICS 594, 594-97 (1985).

12. Surgeon General Report, *supra* note 8, at 238-59; see also Sandler et al., *Cancer Risk in Adulthood from Early Exposure to Parents' Smoking*, 75 AM. J. PUB. HEALTH 487 (1985); Ira B. Tager, *Passive Smoking and Respiratory Health in Children: Sophistry or Cause for Concern?* 133 AM. REV. RESP. DIS. 959 (1986).

13. Julie Gannon Shoop, *Smoking Parents Lose Points in Child-Custody Case*, Trial, Feb. 1991 at 82 [hereinafter Shoop, *Smoking Parents*]. Dr. Cahan testified in *Satalino v. Satalino*, No. 11440-86 (N.Y. Sup. Ct.), where the judge considered a parent's smoking habit as one of many legitimate factors to consider in a custody dispute.

14. See R.A. Etzel et al., *Passive Smoking and Middle Ear Effusion Among Children in Day Care*, 90 Pediatrics 228, 228-32 (1992); B.D. Reed et al., *Household Smoking Exposure—Association with Middle Ear Effusions*, 20 FAM. MED. 426, 426-30 (1988).

15. See G. Said, *Parental Smoking Related to Adenoidectomy and Tonsilectomy in Children*, 32 J. Epid. Comm. Health 97, 97-101 (1978); D.J. Willatt, *Children's Sore Throats Related to Parental Smoking*, 11 CLIN. OTOLARYNGOL. 317, 317-21 (1986).

16. Shoop, *Smoking Parents*, *supra* note 13, at 82.

child to live in a home with a heavy smoker similar to "returning the child to an asbestos-lined home or a home built on radioactive soil."¹⁷ Dr. Cahan's views regarding the impact of secondhand smoke on children have widespread support from the medical and legal commentators.¹⁸

Scientists have also connected the dangers of secondhand smoke to Sudden Infant Death Syndrome (SIDS)¹⁹ and to prenatal injuries, "such as low birth weight, variations in body length, an increase in the possibility of severe congenital malformations, and even perinatal mortality."²⁰ Related to such effects, but beyond the scope of this article, is the question of whether prenatal injuries connected to secondhand smoke constitutes child abuse or neglect,²¹ based upon a plausible ex-

17. *Id.*

18. See Allison D. Schwartz, Comment, *Environmental Tobacco Smoke and Its Effect on Children: Controlling Smoking in the Home*, 20 B.C. ENVTL. AFF. L. REV. 135 (1993) (providing an exhaustive review of government studies, private studies, and medical and legal commentary in accord with the view that children suffer significant health problems due to prolonged exposure to secondhand smoke in the home) [hereinafter Schwartz]; see also Anne Charlton, *Children's Coughs Related to Parental Smoking*, 28 BRIT. MED. J. 1647 (1984); Janerich, *supra* note 9, at 633-34 (medical study documenting that household exposure to heavy smoking doubles risk of lung cancer in children).

19. See, e.g., A.B. Bergman, *Relationship of Passive Cigarette Smoking to Sudden Infant Death Syndrome*, 58 PEDIATRICS 665, 665-68 (1976); Bengt Haglund et al., *Cigarette Smoking as a Risk Factor for Sudden Infant Death Syndrome: A Population-Based Study*, 80 AM. J. PUB. HEALTH 29, 29-32 (1990).

20. Julie E. Lippert, Comment, *Prenatal Injuries from Passive Tobacco Smoke: Establishing a Cause of Action for Negligence*, 78 KY. L.J. 865, 865 (1989-90) (citing Terry R. Martin & Michael B. Bracken, *Association of Low Birth Weight with Passive Smoke Exposure in Pregnancy*, AM. J. EPID., Oct. 1986, at 633; Schwartz-Bickenbach et al., *Smoking and Passive Smoking During Pregnancy and Early Infancy: Effects on Birth Weight, Lactation Period, and Cotinine Concentrations in Mother's Milk and Infant's Urine*, 35 TOXIC LETTERS 73 (1987)). See also John W. Kydd, *Abandoning Our Children: Mothers, Alcohol and Drugs*, 69 DENV. U. L. REV. 359, 373-74 (1992) [hereinafter Kydd].

Among other specific warnings, the 1984 United States Congress adopted the following labeling requirements for cigarettes: "SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight." Pub. L. No. 98-474, 98 Stat. 2201 (codified at 15 U.S.C. § 1333(a)(1) (1988)).

21. Some state courts have already considered the effects of secondhand smoke to children in the context of abuse and neglect proceedings. The effects of secondhand smoke, however, were considered only as one of many factors in the court's decision to restrict or terminate the parent's rights. See, e.g., *In re J.W. & J.C.*, 736 P.2d 960 (Mont. 1987); Uhlich, *supra* note 5, at 747 n.116. See also Schwartz, *supra* note 18, at 158-61.

tension of the rationale of some courts and commentators that prenatal injuries caused by a mother's drug or alcohol use during pregnancy constitutes such abuse or neglect.²²

Despite the wide range of documented health problems posed by secondhand smoke, from prenatal injuries to the threats posed to adult nonsmokers, the Tobacco Institute and those groups and individuals connected with the tobacco lobby still claim that the link between secondhand smoke and health problems in nonsmokers is inconclusive, and that secondhand smoke may not be dangerous at all.²³ However, their view does not appear credible when one considers the overwhelming consensus among the government and private studies to the contrary. One author summarizes the health risks of secondhand smoke in this manner:

In the case of the smoker himself, it could plausibly . . . be argued that the risks of smoking were somehow voluntarily incurred. In the case of the passive smoker, that argument would be far harder to sustain. Passive smokers do not themselves light up. They merely breathe. You can voluntarily choose to do something only if you can, realistically, choose not to do it; and no one can choose not to breathe.²⁴

22. See, e.g., *In re Ruiz*, 27 Ohio Misc. 2d 31 (1986); Ellen L. Townsend, Note, *Maternal Drug Use During Pregnancy as Child Neglect or Abuse*, 93 W. Va. L. Rev. 1083 (1991); Kydd, *supra* note 20, at 370-77. In his article, Kydd argues that any criminal statute a legislature contemplates adopting (relating to maternal drug use during pregnancy) "must consider criminalizing pregnant women's consumption of alcohol and tobacco." *Id.* at 390.

23. See The Tobacco Inst., Scientific Comments Critical of the Draft Epa Ets Risk Assessment 1 (1990); see also Julie Gannon Shoop, *Tobacco Industry Wins Two More, Sues EPA Over Passive Smoking Ruling*, TRIAL, Aug. 1993, at 87; Uhlich, *supra* note 5, at 741-42. But cf. SURGEON GENERAL REPORT, *supra* note 8, at xi-xii. The Surgeon General has stated that:

Critics often express that more research is required, that certain studies are flawed, or that we should delay action until more conclusive proof is produced [T]he time for delay is past; measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.

Id.

24. R. Goodin, No Smoking, The Ethical Issues 69 (1989) cited in Alan B. Llorowitz, Comment, *Terminating the 'Passive' Paradox: A Proposal for Federal Regulation of Environmental Tobacco Smoke*, 41 AM. U. L. REV. 183, 185 (1991-92) [hereinafter *Federal Regulation of ETS*] (wherein the author notes that "environmental health risks of similar or

This argument should have particular application as it relates to the risks to which smoking parents subject their children, who have no realistic choice in determining their parents' health habits.

III. PROTECTIONS EXTENDED TO ADULT NONSMOKERS

With the dangers of secondhand smoke well accepted, adult nonsmokers have turned to the courts and to their legislatures for protection from the health hazards posed by exposure to tobacco smoke. Courts have rendered opinions protecting the rights of inmates and of employees in the workplace from such exposure. Consistent with the rationale of these courts, most state legislatures, as well as the federal government, have enacted laws related to the dangers of secondhand smoke.

A. Inmate Claims

In *McKinney v. Anderson*,²⁵ an incarcerated convict (a nonsmoker) complained that his confinement in a poorly ventilated cell with a heavy smoker violated the Eighth Amendment's proscription against cruel and unusual punishment.²⁶ Noting that prisoners' conditions of confinement are subject to judicial review,²⁷ the United States Court of Appeals for the Ninth Circuit noted it had previously held in *Franklin v. Oregon*²⁸ that housing an inmate who had a preexisting health condition with a smoker may violate the Eighth Amendment.²⁹ Unlike *Franklin*, the claim by the inmate in *McKinney* raised the issue of whether an inmate who had *no* preexisting health condition may still

even lesser magnitude [than secondhand smoke] have priority in the federal policy agenda because they stand at the forefront of public concern and do not engender political friction").

25. 924 F.2d 1500 (9th Cir.), *vacated and remanded sub nom.*, *Helling v. McKinney*, 112 S. Ct. 291 (1991), *reinstated on remand*, 959 F.2d 853 (9th Cir.), *cert. granted*, 112 S. Ct. 3024 (1992), *aff'd*, 113 S. Ct. 2475 (1993).

26. *McKinney*, 924 F.2d at 1502.

27. *Id.* at 1504.

28. 662 F.2d 1337 (9th Cir. 1981).

29. *McKinney*, 924 F.2d at 1504.

have a valid cause of action under the Eighth Amendment by alleging that continual involuntary exposure to secondhand smoke posed an unreasonable risk of harm to his health.³⁰

The court in *McKinney* reviewed the scientific evidence rapidly accumulating regarding the adverse health effects of exposure to secondhand smoke, noting that such adverse health effects are magnified in the prison setting due to the nearly constant exposure to secondhand smoke.³¹ The court also cited the growing body of state and federal laws and regulations protecting nonsmokers from the dangers of secondhand smoke³² concluding that "the attitude of our society has evolved to the point where, today, it indeed violates society's standards of decency to expose an unwilling inmate to levels of ETS that pose an unreasonable risk of harm to human health."³³

McKinney is a significant victory³⁴ for nonsmokers in that the court did not require the inmate nonsmoker to show he suffered from a preexisting health condition that was aggravated by secondhand smoke. However, other federal courts have taken a narrower view than the *McKinney* Court. For example, in *Hunt v. Reynolds*,³⁵ the United States Court of Appeals for the Sixth Circuit held that "the Eighth Amendment's objective component is violated by forcing a prisoner with a serious medical need for a smoke-free environment to share his

30. *Id.*

31. *Id.* at 1505-07.

32. *Id.* at 1508-09.

33. *Id.* at 1505. See also David T. Cox, Note, *McKinney v. Anderson: Cruel and Unusual Smoke — Eighth Amendment Limitations on Conditions of Confinement in Prisons*, 18 J. Contemp. L. 131 (1992); Lynn M. Galbraith-Wilson, Note, *The Call for State Legislation on Environmental Tobacco Smoke in State Prisons*, 13 HAMLINE J. PUB. LAW & POL'Y 335 (1992); Jeffrey S. Kinsler, *Exposure to Tobacco Smoke is More Than Offensive, It Is Cruel and Unusual Punishment*, 27 VAL. U. L. REV. 385 (1992-93); Schwarz, *supra* note 18, at 146-48.

34. For federal court opinions distinguishable from *McKinney*, see *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc); *Steady v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992); *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989).

35. 974 F.2d 734 (6th Cir. 1992). See also *Avery v. Powell*, 695 F. Supp. 632 (D. N.H. 1988). To prevail on remand, the *Avery* court implicitly suggested that the inmate must establish his constant involuntary exposure to secondhand smoke is harmful to his health. *Id.* at 640 (emphasis added).

cell with an inmate who smokes.”³⁶ Without such “serious medical need for a smoke-free environment,” these federal courts find no Eighth Amendment violation.³⁷

B. Employee Workplace Claims

Citing the same scientific and medical evidence relating to the health hazards of secondhand smoke, courts have extended protections to nonsmokers in the workplace. For example, in *Smith v. Western Electric Co.*,³⁸ Smith, a nonsmoker employee with particularized health problems, sued his employer when exposure to secondhand smoke exacerbated his health problems. Smith claimed that his employer failed to use reasonable care to provide a reasonably safe workplace by refusing to segregate smokers or to limit smoking to non-work areas.³⁹ While the court in *Smith* could have limited its holding to apply only to those employees with health problems aggravated by tobacco smoke, the court held that secondhand smoke in the work areas was hazardous to the health problems of all of the employees and to the plaintiff in particular.⁴⁰ In the view of the court, by failing to eliminate the hazardous condition, the employer breached its duty to provide a reasonably safe workplace.⁴¹

36. *Hunt*, 974 F.2d at 736 (emphasis added).

37. *See id.* It appears that where an inmate has a preexisting health condition aggravated by secondhand smoke, the courts will review the inmate’s request for relief on the theory that the actions of the prison officials in permitting such exposure is a “deliberate indifference to a serious medical need.” *Beeson v. Johnson*, No. 89-7146, 1990 WL 2330, at *2 (4th Cir. Jan. 2, 1990). *See also* Michael S. Vaugh & Rolando V. Del Carmen, *Smoke-Free Prisons: Policy Dilemmas and Constitutional Issues*, 21 J. Crim. Just. 151 (1993).

38. 643 S.W.2d 10 (Mo. Ct. App. 1982).

39. *Id.* at 12.

40. *Id.* at 13.

41. *Id.* (citing *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408 (N.J. 1976)). The *Smith* court granted an injunction against the employer even though the “harm” alleged by the employee had not yet resulted in full-blown disease or injury. *Smith*, 643 S.W.2d at 13. “Plaintiff should not be required to await the harm’s fruition before he is entitled to seek [relief].” *Id.* In *Shimp*, the judge pointed out that since smoking was banned in one room of the employer’s workplace because it adversely affected the operation of a computer, the employer should demonstrate the same degree of concern for its employees. 368 A.2d at 416.

By statute, West Virginia has codified the rationale of *Smith* and *Shimp* by stating that “[e]very employer shall furnish employment which shall be *reasonably safe*” W.

One commentator has noted that, "[t]he growing trend to restrict smoking is an indication that our society has reached a point in time where the ordinarily prudent employer protects its employees from passive tobacco smoke pursuant to the employer's common law duty [to provide a reasonably safe workplace]."⁴² Employers who have disregarded such duty face nonsmoker employee lawsuits, and courts often side with the employee.⁴³

In addition to succeeding under the common law and negligence theories related to an employer's duty to provide a safe workplace, nonsmoker employees have also prevailed in claims for workers' compensation⁴⁴ and unemployment benefits.⁴⁵ Military employees sensitive to tobacco smoke have also succeeded in requiring their employer to make a reasonable accommodation for their health problems.⁴⁶

The protections extended to nonsmokers in the workplace have roots in sound public policy. Aside from the various physical discom-

Va. Code § 21-3-1 (1985) (emphasis added). With such a law, and considering the well accepted health hazards of secondhand smoke, it would be hard to imagine a result in West Virginia in an employee nonsmoker action different from that in *Smith* or *Shimp*.

42. Raymond L. Paoella, *The Legal Rights of Nonsmokers in the Workplace*, 10 U. Puget Sound L. Rev. 591, 601-02 (1987) [hereinafter Paoella].

43. See, e.g., *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408 (N.J. 1976); *Hentzel v. Singer*, 188 Cal. Rptr. 159 (Ct. App. 1982).

44. See *Schober v. Mountain Bell Tel.*, 630 P.2d 1231 (N.M. Ct. App. 1980); *Johannesen v. New York City Dep't. of Hous. Preservation & Dev.*, 154 A.2d 753 (N.Y. 1989); *In re Downey*, No. 83-01911 (Or. Workers' Comp. Bd. 1985); *McCarthy v. Dep't of Social & Health Services*, 759 P.2d 351 (Wash. 1988). See also Schwartz, *supra* note 18, at 150-52.

45. See *McCrocklin v. Employment Dev. Dep't.*, 205 Cal. Rptr. 156 (1984); *Alexander v. Unemployment Ins. Appeals Bd.*, 163 Cal. Rptr. 411 (1980); *Lapham v. Commonwealth Unemployment Compensation Bd. of Review*, 519 A.2d 1101 (Pa. Commw. Ct. 1987). See also *Quinn, Gent, Buseck & Leemhuis, Inc. v. Unemployment Compensation Bd. of Review*, 606 A.2d 1300 (Pa. Commw. Ct. 1992) (wherein the court upheld a denial of unemployment benefits to a smoker who left his job due to the employer's implementation of an "unquestionably reasonable" smoking ban). By statute in West Virginia, it is unlawful for any employer to fire or to refuse to hire a person solely because the person uses tobacco products off the employer's premises during nonworking hours. W. Va. Code § 21-3-19 (Supp. 1994).

46. See *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982); *Pletten v. Dep't of the Army*, Nos. CH07528010099, CH01520 #2901 (U.S. Merit Sys. Protection Bd. 1981).

forts nonsmokers suffer when forced to work in smoke-filled work areas, nonsmokers in such environments are less productive, and health care expenses are greater.⁴⁷ Although they have yet offered only a piecemeal solution to the secondhand smoke hazard in the workplace, those courts which have extended protections to nonsmoking employees have raised the consciousness of the judiciary as to the severity of the problem.

C. Legislation

Consistent with court decisions protecting adult nonsmokers from exposure to secondhand smoke, most state legislatures and the federal government have enacted laws regulating smoking in public places. Forty-six states and the District of Columbia have enacted laws restricting smoking for the benefit of nonsmokers.⁴⁸ Thirty states restrict smoking in public buildings, twenty states limit smoking in the workplace, and seventeen states have laws regulating smoking in retail stores and restaurants.⁴⁹ An example of the legislative intent behind such statutes is the declaration of Rhode Island's legislation:

The uses of tobacco for smoking purposes is being found to be increasingly dangerous, not only to the person smoking, but also to the non-smoking person who is required to breathe such contaminated air. The most pervasive intrusion of the non-smoker's right to unpolluted air space is the uncontrolled smoking in public places.⁵⁰

47. *Paoletta*, *supra* note 42, at 592-96. See also Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy*, 62 Notre Dame L. Rev. 940 (1987); Thomas W. Sculco, Note, *Smokers' Rights Legislation: Should the State "Butt Out" of the Workplace*, 33 B.C. L. REV. 879 (1992).

48. See Rick Kirshenblatt, Note, *An Overview of Current Tobacco Litigation and Legislation*, 8 U. Bridgeport L. Rev. 133, 172 (1987) [hereinafter Kirshenblatt]. This Note provides an appendix categorizing the various state statutes related to smoking. *Id.* at 175-82 app. A. See also Schwartz, *supra* note 18, at 154-58.

49. Kirshenblatt, *supra* note 48 at 175-82 app. A.

50. R.I. Gen. Laws § 23-20.6-1 (1985). See also N.J. STAT. ANN. § 26:3D-38 (West 1987) ([t]obacco smoke is "at least an annoyance and a nuisance to a substantial percentage of the nonsmoking public, and . . . a substantial health hazard to a smaller segment of the nonsmoking public").

In West Virginia, the state legislature has enacted criminal penalties for individuals who smoke tobacco in any school building.⁵¹ The intent of this legislation is to discourage and ban the use of tobacco products by minors.⁵² The legislature has also banned smoking where prohibited by sign in any factory, mercantile establishment, mill, or workshop.⁵³

In addition to state legislation, the federal government has enacted legislation and regulations restricting smoking.⁵⁴ Congress recently amended a statute that temporarily banned smoking on airline flights of two hours or less to include a permanent ban on smoking on all domestic flights in the United States regardless of duration.⁵⁵ Federal agencies have enacted regulations limiting smoking in certain federal buildings⁵⁶ and in vehicles such as buses engaged in interstate transportation.⁵⁷

In the face of the health risks of secondhand smoke, confirmed by the widespread recognition of its hazards, it takes no great acumen to understand why courts and legislatures have extended protections to adult nonsmokers. Considering that such protections have been provided to incarcerated convicts, employees in the work place, applicants for worker's compensation and unemployment benefits, military personnel, airline and public transportation passengers, visitors of public places, and children in school settings, it was only a matter of time until the issue of children's exposure to secondhand smoke would be raised in family law courts across the nation.

51. W. Va. Code § 16-9A-4 (1991). This statute also gives local school authorities the right to further restrict the use of tobacco products in any public school building under their jurisdiction. *Id.*

52. W. Va. Code § 16-9A-1 (1991).

53. W. Va. Code § 21-3-8 (1989).

54. See Kirshenblatt, *supra* note 48, at 167-71; see also H. Ward Classen, *Restricting the Right to Smoke in Public Areas: Whose Rights Should Be Protected?*, 38 Syracuse L. Rev. 831 (1987); *Federal Regulation of ETS*, *supra* note 24; Schwartz, *supra* note 18, at 154-58.

55. 49 U.S.C.A. § 1374(d)(1)(A) (West Supp. 1990). See also 14 C.F.R. § 252.1 to -.7 (1989).

56. See 41 C.F.R. § 101-20.105-3(a) (1989).

57. See 49 C.F.R. § 1061.1 (1985).

IV. CHILD CUSTODY/VISITATION CASES

One of the first reported cases to address the impact of secondhand smoke in a child custody case is *Roofeh v. Roofeh*.⁵⁸ The husband in *Roofeh*, a physician who presented substantial scientific materials showing the health impact of secondhand smoke on children, requested a protective order against his wife prohibiting her from smoking in the presence of their children.⁵⁹ The wife, who was described as a "chain smoker," did not dispute the detrimental effects of smoking on those who passively inhaled smoke, but she denied any causative relationship between her smoking and the children's respiratory problems.⁶⁰

Since the husband in *Roofeh* did not allege (as required by statute) any criminal violations or domestic violence by the wife, the court denied the husband the protective order.⁶¹ However, citing its "inherent power in matrimonial matters to issue orders safeguarding the health and safety of the [husband] and the children," the court nonetheless issued a temporary order restricting the wife from smoking in the presence of the parties' children.⁶²

One month after the *Roofeh* decision, an appeals court in Texas upheld a split custody arrangement that awarded the custody of one child to the nonsmoking father.⁶³ The mother had smoked in the presence of the child, who was extremely allergic to smoke.⁶⁴ A third case in 1988 revolved around the husband's request to prohibit his ex-wife from smoking around the parties' child in a confined environ-

58. 525 N.Y.S.2d at 765.

59. *Id.* at 766.

60. *Id.* It is not clear from the statement of facts in *Roofeh* as to whether the parties' children actually had any preexisting respiratory conditions aggravated by secondhand smoke, but the judge's summary of the wife's arguments appears to lead one to the conclusion that such health conditions were in fact present.

61. *Roofeh*, 525 N.Y.S.2d at 769.

62. *Id.* This decision resulted from a temporary, but not final, divorce hearing.

63. Pizzitola, 748 S.W.2d at 568.

64. *Id.* at 569.

ment, such as in the home or in an automobile.⁶⁵ Basing its decision on the child's welfare, the court granted the husband's request.⁶⁶

In *Badeaux v. Badeaux*,⁶⁷ the court affirmed a trial judge's order limiting the visitation rights of a father because the father, his mother, and his stepfather, with whom the father lived when he exercised visitations, were all smokers.⁶⁸ The parties' twenty-month-old child had contracted bronchial asthma and was subject to repeated upper respiratory infections which were aggravated by tobacco smoke at the father's residence.⁶⁹

The decisions in several other family court cases indicate that where a child has a particular health problem, smoking by the parents in the child's presence will be prohibited.⁷⁰ Some courts enforce these prohibitions with criminal contempt measures.⁷¹ Other courts go much further than a mere warning. For example, in *Masone v. Tanner*,⁷² a

65. *Reeves v. Reeves*, No. 44333 (4th Cir. Ct. for Knox Cty, Tenn. 1988), reported in *Custody Cases Involving Parents Who Smoke*, Action on Smoking and Health, Oct. 26, 1993, at 1 [hereinafter *ASH Custody Cases*]. The Action on Smoking and Health (ASH) is a nonprofit organization located in Washington, D.C., which is concerned with the problems of smoking and the rights of nonsmokers and is led by John Banzhaf, III, a professor at George Washington University's National Law Center.

66. *ASH Custody Cases*, *supra* note 65, at 1.

67. 541 So. 2d at 301.

68. *Id.* at 302.

69. *Id.*

70. See, e.g., *Lamacchia v. Lamacchia*, No. B89-2922 (Mass. Prob. & Fam. Ct.); *Potter v. Potter*, 3 Mich. L.W. 1968 (Ct. App. 1989); *Nocera v. Nocera*, File No. B 89-2992DM (Mich. Cir. Ct. May 29, 1991). In *Lamacchia*, the nonsmoking father noted that before entry of the court's order, his son was constantly wheezing and coughing, but that his condition greatly improved after his ex-wife (who had custody) stopped smoking around the son in compliance with the order. The father in *Lamacchia* subsequently formed a grassroots organization, Parents Against Secondhand Smoke (PASS), which provides information kits to parents raising the secondhand smoke issue in custody disputes. See Renee Cordes, *Smoking Adds New Fire to Custody Disputes*, Trial, Feb. 1993, at 95, 95-96. See also Shoop, *Smoking Parents*, *supra* note 13, at 82.

71. *Sulva v. Isaacson*, (Ill. Trial Ct. 1992), reported in *ASH Custody Cases*, *supra* note 65, at 3. The judge ordered that the father could not smoke during his visitations and that smoking even one cigarette in front of his son could lead to a contempt of court finding and a jail sentence of up to six months. *Id.*

72. Unreported Decision, Sacramento, California (Oct. 13, 1993), reported in *ASH Custody Cases*, *supra* note 65, at 3. See also Tamar Lewin, *Smokers Find Mark Against Them in Custody Fights*, New York Times, Oct. 16, 1993.

county judge in Sacramento, California, granted a nonsmoking father's request to remove an eight year old girl from the custody of her mother, the husband's ex-wife.⁷³ Five years earlier, the husband obtained an order prohibiting the wife from smoking around or near the child, but the wife continued to smoke until the child had an asthma attack (the child had only forty-three percent of her breathing capacity due to the continued exposure to tobacco smoke).⁷⁴ Also, in *Mitchell v. Mitchell*,⁷⁵ a court refused to return an asthmatic child to the mother who, despite a pediatrician's advice, continued smoking in the child's presence.⁷⁶ Although the mother joined a smoking cessation program, the trial judge found that her prior failure "to stop smoking was strong evidence of lack of proper concern for the welfare of the child [and a] belated cessation of smoking might evidence desire for the custody of the child rather than a concern for the welfare of the child."⁷⁷

Although most of the cases discussed above involved children with particular health problems aggravated by secondhand smoke, a decision by a New York trial judge indicates that barring secondhand smoke around a child without particular health problems may be on the horizon. In *Satalino v. Satalino*,⁷⁸ the judge stated that smoking is "one factor among the many that *must be considered*, as would alcohol consumption for example, when viewing the suitability of a household environment in which a child is to be placed."⁷⁹ Other forward looking jurists have espoused similar rationale in their decisions limiting the custody or visitation rights of smoking parents.⁸⁰

73. *Masone*, reported in *ASH Custody Cases*, *supra* note 65, at 3.

74. *Id.* See also Andrea Sachs, *Home Smoke-Free Home*, Time, Oct. 25, 1993, at 56.

75. Appeal No. 01-A-01-9012-CV-00442 (Tenn. Ct. App., April 26, 1991).

76. *Id.*

77. *Id.*

78. No. 11440-86 (N.Y. Sup. Ct.).

79. *Id.* (emphasis added). The judge nevertheless awarded custody to the smoking wife since other factors, including the husband's prior drug addiction and continuing recovery, outweighed the smoking issue. *Id.* See also Amy Dockser Marcus, *Parent's Smoking Becomes Issue in Child Custody Cases*, Wall St. J., Oct. 18, 1990, at B1.

80. See, e.g., *De Beni Souza v. Kallweit*, 16 Fam. L. Rep. (BNA) 1496 (Cal. Super. Ct. 1990); *Montufar v. Narot*, Docket No. FM 04-0021-8789 (N.J. Sup. Ct., July 23, 1993); *Strathmann v. Foster* (Pa. Ct. C.P. 1991), reported in *ASH Custody Cases*, *supra* note 65, at 2. In *Montufar*, the court ordered the custodial mother, her relatives, and her visitors that all smoking must occur outdoors and that the children must be removed from any situation or

One jurist who issued an order prohibiting smoking around a couple's children commented that "[a]t some point, courts must step in to limit the rights of individuals, when the exercise of those rights jeopardize the liberty and safety of others."⁸¹ The judge further noted that, while smoking is not specifically mentioned in his state's child custody guidelines,⁸² this issue could be plausibly raised under the sections of the guidelines dealing with provisions of medical care, mental and physical needs of a child, stable and satisfactory environment, or the section permitting the consideration of any other factor.⁸³

All of these cases represent a growing trend toward judicial recognition of the deleterious impact of secondhand smoke on children.⁸⁴ Based upon a recent survey of Family Law Masters, it appears likely that the Supreme Court of Appeals of West Virginia will soon have to address the importance of smoke exposure in child custody cases.⁸⁵

location where they are exposed to secondhand smoke. *ASH Custody Cases*, *supra* note 65, at 2. In *Strathmann*, the judge ordered that there shall be no smoking in the father's home for at least 48 hours before his children are to visit and that the mother shall also provide the children with a smoke-free environment. *ASH Custody Cases*, *supra* note 65, at 2.

81. Genesee County Circuit Judge Earl E. Borradaile, (who presided over the *Nocera* case, *supra* note 70) *quoted in* Richard A. Dumas, *Smoking Could Become Custody Battle Weapon*, *Law. Wkly.*, June 24, 1991 at A1 [hereinafter Dumas].

82. See Mich. Comp. Laws Ann. § 722.23(3) (1991).

83. Dumas, *supra* note 81, at A32. The judge did not suggest that smoking should be weighted more heavily than any other factor in the guidelines, but that it must be given equal weight (unless an appellate court directs otherwise). *Id.* See also Uhlich, *supra* note 5, at 730 n.19 (wherein the author lists 22 states, including Michigan, which by statute have delineated the physical health of a child as a consideration, among other factors).

84. See, e.g., Susan Freinkel, *Non-Smokers Find New Cudgel in Custody Fights*, *Legal Times*, Oct. 4, 1993, at 2 (discussing a Contra Costa County, California trial court ruling prohibiting visiting father from smoking around his children and noting the increasing number of cases addressing the issue in custody disputes.). See also Albert Momjian & Natalie Finkelman, *When Custodial Rights Go Up In Smoke*, *MATRIMONIAL STRATEGIST*, Dec. 1991, at 3.

85. Survey conducted by the author of this article by mail from Feb. 1, 1994 to Feb. 14, 1994. Twenty of the twenty-two Masters (excluding the author and one Master who was recently appointed to begin serving Jan. 1, 1994) were mailed a copy of the survey. The complete results are as follows:

1. Number of Masters responding to survey: 11
2. Have you presided over any child custody/visitation dispute in which one party raised the issue of the other party's smoking (tobacco smoke only) in the presence of the parties' children? 8-YES 3-NO

Eight of the eleven Masters who responded to the survey stated that they have presided over at least one child custody/visitation case in which a party criticized the other party's smoking in the presence of the parties' children.⁸⁶ Of those Masters who presided over such a case, seven Masters considered the issue as one among many other factors in their resolution of the dispute, and four Masters found the issue determinative of the dispute because the child had a particular health problem aggravated by secondhand smoke.⁸⁷

When asked their opinion of the secondhand smoke issue, only two of the Masters said that the issue should not be considered. The remaining nine Masters felt that the secondhand smoke issue should be considered either as a factor among many others in the decision-making process or as a determinative factor in the dispute if the child has a particular health problem aggravated by secondhand smoke.⁸⁸ In light of this survey and of the issues raised by children's exposure to secondhand smoke, the balance of this article will focus on how the

-
3. If the answer to question 2 is yes, please state how many cases in which the issue of secondhand smoke was raised? 22 (all Masters combined)
 4. If the issue of secondhand smoke was raised, did you consider the issue as determinative of the dispute? 2-YES 6-NO
 5. If the issue of secondhand smoke was raised, did you consider the issue as one among many factors in your resolution of the dispute? 7-YES 1-NO
 6. Please check whether you believe the issue of a child's exposure to secondhand smoke due to a parent's smoking habit should be (some Masters checked more than one category):
 0-determinative of the dispute irregardless of whether the child has any particular susceptibility to secondhand smoke;
 4-determinative of the dispute because the child has a particular health susceptibility to secondhand smoke;
 7-considered as a factor among many other factors in the decision-making process;
 2-not considered as a factor in the dispute; or
 0-no opinion.
 7. Please provide any additional comments: (Too extensive to list).

Id.

86. *Id.* Three Masters have not presided over any case involving the secondhand smoke issue.

87. *Id.*

88. *Id.*

Supreme Court of Appeals of West Virginia would likely address different facets of this issue if presented on appeal.

V. ANALYSIS OF THE SECONDHAND SMOKE ISSUE UNDER WEST VIRGINIA LAW

Except for mandating that child custody decisions should be made from a gender neutral perspective,⁸⁹ the West Virginia legislature has refrained from directing how child custody and visitation disputes should be resolved.⁹⁰ As such, the guidelines by which custody and visitation disputes should be resolved have been entirely defined by the courts. Therefore, whether the secondhand smoke issue has any bearing upon the custody and visitation decision-making process must be discerned from existing West Virginia cases.

One area of the custody and visitation decision-making process that the secondhand smoke issue may impact is the area of parental

89. In 1980, the West Virginia legislature amended § 48-2-15 providing, in relevant part, that "[t]here shall be no legal presumption that, as between the natural parents, either the father or the mother should be awarded custody of said children but the court shall make an award of custody solely for the best interest of the children based upon the merits of each case." W. Va. Code § 48-2-15 (1992).

90. Statutory reference to awarding custody and visitation is limited. For example, in West Virginia, the law provides that a court may order the following temporary relief:

(2) The court may provide for the custody of minor children of the parties subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, *as may be appropriate under the circumstances.*

(3) In every action where visitation is awarded, the court shall specify a schedule for visitation by the noncustodial parent

W. Va. Code § 48-2-13(a) (Supp. 1994) (emphasis added). Additionally, the law provides that:

Upon ordering the annulment of a marriage or a divorce or granting of a decree of separate maintenance, the court may further order all or any part of the following relief:

(1) The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, *as may be appropriate under the circumstances.* In every action where visitation is awarded, the court shall specify a schedule for visitation by the noncustodial parent[.]

W. VA. CODE § 48-2-15(b) (Supp. 1994) (emphasis added).

fitness. In *David M. v. Margaret M.*, the Supreme Court of Appeals of West Virginia stated that:

To be a fit parent, a person must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child abuse, and other similar vices; and (5) refrain from immoral behavior under circumstances that would affect the child. In this last regard, restrained normal sexual behavior does not make a parent unfit. The law does not attend to traditional concepts of immorality in the abstract, but only to whether the child is a party to, or is influenced by, such behavior.⁹¹

With this standard, one might argue that exposing a child to secondhand smoke would be similar to failing to protect the child from harm, or failing to provide the child with habitable housing.

However, a review of recent West Virginia decisions related to the parental fitness standard set forth in *David M.* would likely lead to the conclusion that such parents are not unfit for merely smoking in the presence of their child unless the secondhand smoke has a deleterious impact upon the child. For example, in *Moses v. Moses*,⁹² the court addressed the recurring question of whether acts of sexual misconduct by a parent could be considered as evidence going to the fitness of that parent.⁹³ In *Moses*, the mother admitted that she engaged in an extramarital sexual relationship, but no evidence was presented that any of the acts of infidelity had been committed in the children's presence

91. 385 S.E.2d 912, 924 (W. Va. 1989). See *Rozas v. Rozas*, 342 S.E.2d 201, Syl. Pt. 1 (W. Va. 1986) ("[a] parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, . . . the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts") (quoting, *State ex rel. Kiger v. Hancock*, 163 S.E.2d 798, Syl. Pt. (1969)). See also *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978). In *J.B.*, the Court stated that "[i]n order to be fit, it is obvious that a mother must be willing to offer the type of closeness and physical contact which we assume on the part of mothers. Where a mother is emotionally unsupportive, fails to provide routine cleanliness, fails to prepare nourishing food, or otherwise demonstrates her unfitness, the [maternal preference] presumption, by its own terms, will not apply." 242 S.E.2d at 253 (decided prior to the 1980 amendment to W. Va. Code § 48-2-15).

92. 421 S.E.2d 506 (W. Va. 1992).

93. *Id.* at 510.

or had in any other way negatively impacted the children.⁹⁴ The court held that, "in a domestic custody situation, the focus of an examination of a parent's conduct is not normally on whether the conduct is morally pure, *but upon whether the conduct has a deleterious effect upon the children.*"⁹⁵ Because such deleterious impact was absent, the court ruled that the extramarital affair should not be a factor affecting the mother's fitness.⁹⁶

With the requirement that a parent's conduct must have a deleterious impact upon his or her child before that parent can be declared unfit, it would be unlikely that the court would sustain a ruling of unfitness regarding a parent who smokes in the presence of his or her child unless the exposure to the secondhand smoke negatively effects the child. Such negative effects might be evident where a child has a particular health problem aggravated by secondhand smoke, but would be more difficult to find where a child has no particular health susceptibilities, and the effects of secondhand smoke may not be readily apparent.

However, it does appear that the deleterious impact requirement of *Moses* and related cases would limit a finding of unfitness to those cases in which a parent continually exposes a child to tobacco smoke where that child has a particular health problem aggravated by such exposure. A plausible argument could also be made that the conduct of a smoking parent with a child having a particular health problem may be only one factor in the fitness decision, rather than the determinative factor.

Declaring a parent unfit is no easy task in West Virginia. In *State ex rel. Kiger v. Hancock*,⁹⁷ the court held that, "[i]n order to separate a child from its parent on the ground of the unfitness of the parent

94. *Id.*

95. *Id.* (emphasis added) (citing *J.B.*, 242 S.E.2d at 248). *Accord* *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625, Syl. Pt. 1 (W. Va. 1991); *Goetz v. Carpenter*, 367 S.E.2d 782, Syl. Pt. 3 (W. Va. 1988); *Isaacs v. Isaacs*, 358 S.E.2d 833 (W. Va. 1987); *M.S.P. v. P.E.P.*, 358 S.E.2d 442, Syl. Pt. 4 (W. Va. 1987); *Stacy v. Stacy*, 332 S.E.2d 260, Syl. Pt. 3 (W. Va. 1985).

96. *Moses*, 421 S.E.2d at 510.

97. 168 S.E.2d at 798.

there must be cogent and convincing proof of that fact.”⁹⁸ Further, in *David M.*, the court added that in the fitness determination, the court does not assess relative degrees of fitness between the parents, but asks only whether the parent “achieves a passing grade on an objective test.”⁹⁹ This heightened standard to prove unfitness, coupled with the minimum requirement to establish fitness, does not lend assistance to the litigant alleging a smoking parent is unfit because he or she exposes a child to tobacco smoke.

However, considering the growing consensus regarding the dangers of secondhand smoke to children,¹⁰⁰ the fitness factors set out in *David M.*, relating to habitable housing and protection of a child from harm, appear to be fertile ground for future litigation of the secondhand smoke issue. In *Richardson v. Richardson*,¹⁰¹ the court focused on these factors in declaring a mother unfit because, among other complaints, she allowed several *potentially* hazardous situations to exist in the home.¹⁰² If the court in *Richardson* cited as one of its reasons for declaring a parent unfit a *potential* hazard in the children’s home, then one might plausibly suggest that the court should declare a parent unfit (in a fitness determination) where a parent smokes in the presence of his or her children because the hazard from secondhand smoke to children is real, not potential, particularly as to those children with health problems aggravated by secondhand smoke.

While it may be difficult for a party to successfully raise the secondhand smoke issue in the context of a parental fitness determination, the West Virginia judiciary should be more receptive to the notion that the issue is relevant as one factor among many others in an examination of the welfare of a child.¹⁰³ It has long been settled in West Vir-

98. *Id.* at 801-02.

99. *David M.*, 385 S.E.2d at 924. The “objective test” referred to by the court is that as set forth in *Moses*, 421 S.E.2d at 510. See also *supra* notes 92-96 and accompanying text.

100. See *supra* notes 6-24 and accompanying text.

101. 415 S.E.2d 276 (W. Va. 1992).

102. *Id.* at 279 (emphasis added).

103. It already appears that the vast majority of Family Law Masters agree with the idea that the secondhand smoke issue should be considered as a factor among many other factors in the decision-making process. See Survey, *supra* note 85.

ginia that the welfare of the child is the polestar by which the discretion of the court will be guided.¹⁰⁴ The court in *Garska v. McCoy*¹⁰⁵ has further held that the best interests of a child of tender years will be served by placing the child with his or her primary caretaker (assuming such caretaker is fit).¹⁰⁶

Although the list of primary caretaker factors¹⁰⁷ delineated by the *Garska* court does not include any specific language regarding a consideration of a parent's smoking habit, one could plausibly raise this issue with respect to medical care of the child.¹⁰⁸ By considering the secondhand smoke issue under this factor, the court would not place any greater weight on the same than that consideration given to all of the other factors discussed in *Garska*. In addition, the court in *Garska* did not intend its list of factors to be all inclusive.¹⁰⁹ As such, the

104. See *In re Custody of Cottrill*, 346 S.E.2d 47 (W. Va. 1986); *Rowsey v. Rowsey*, 329 S.E.2d 57, Syl. Pt. 2 (W. Va. 1985); *Thomas v. Thomas*, 327 S.E.2d 149, Syl. Pt. 2 (W. Va. 1985); *Allen v. Allen*, 320 S.E.2d 112, Syl. Pt. 1 (W. Va. 1984); *Porter v. Porter*, 289 S.E.2d 130, Syl. Pt. 1 (W. Va. 1982); *Hammack v. Wise*, 211 S.E.2d 118 (W. Va. 1975); *State ex rel. Cash v. Lively*, 187 S.E.2d 601 (W. Va. 1972).

105. 278 S.E.2d 357 (W. Va. 1981).

106. *Id.*

107. Those factors include a determination of which parent took primary responsibility of the following parenting duties:

(1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) *medical care*, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and (10) teaching elementary skills, i.e. reading, writing and arithmetic.

Garska, 278 S.E.2d at 363 (emphasis added).

108. See *supra* notes 81-83 and accompanying text (where a Michigan trial court judge suggested that the secondhand smoke issue might be raised in the context of his state's statute on child custody under the guideline regarding the provision of medical care to a child).

109. The *Garska* court stated that, "[w]hile it is difficult to enumerate all of the factors which will contribute to a conclusion that one or the other parent was the primary caretaker parent, nonetheless, there are certain obvious criteria to which a court must initially look." 278 S.E.2d at 362.

secondhand smoke issue might be one factor in the primary caretaker analysis that a litigant can raise among all other caretaker factors.

The secondhand smoke issue could also be raised where no primary caretaker exists. In such cases, the court must make further inquiry regarding the parenting abilities of each parent to determine which will be the better single parent.¹¹⁰ In a situation where both parents share the child rearing responsibilities equally, one parent's smoking habit in the presence of a child may tip the scales in favor of the nonsmoking parent, especially where the child has a particular health problem aggravated by secondhand smoke.

Exposure to secondhand smoke will also effect modification of custody or visitation, as the already persuasive evidence regarding its dangers to children continues to grow and the judiciary becomes more aware of the problems associated with secondhand smoke. The legal standard in such proceedings is also well settled, providing that "[t]o justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child."¹¹¹ In cases where a child has developed problems linked to a parent's smoking, one may reasonably suggest that the welfare of the child would be served by some modification of the existing order, be it a change in custody or a restriction upon the smoking parent.¹¹²

110. See *David M.*, 385 S.E.2d at 923. See also *Graham v. Graham*, 326 S.E.2d 189, 190 (W. Va. 1984) ("when child care and custody are shared in an entirely equal way, no primary caretaker presumption arises and the court must inquire further").

111. *Cloud v. Cloud*, 239 S.E.2d 669, Syl. Pt. 2 (W. Va. 1977). *Accord Phillips v. Phillips*, 425 S.E.2d 834, Syl. Pt. 2 (W. Va. 1992); *Weece v. Cottle*, 352 S.E.2d 131, Syl. Pt. 1 (1986). See also W. Va. Code § 48-2-15(e) (Supp. 1994) (providing for modification of custody "as the circumstances of the parents or other proper person or persons and the benefit of the children may require").

112. In *Anderson v. Newman*, 439 S.E.2d 447 (W. Va. 1993), which involved a modification of custody, a mother attempted to raise for the first time on appeal to the Supreme Court of Appeals of West Virginia the issue of the father's smoking in the presence of the parties' children, one of which children suffered from asthma. The court upheld the trial court's decision to change custody to the father and did not address the smoking issue raised by the mother, stating that, "[t]he precise question we are asked to answer is whether the lower court was justified in deciding, *based upon the evidence before it*, that the welfare of the children would be materially promoted by transferring custody from their mother to their father." *Id.* at 446 (emphasis added). Had the mother in this case raised the smoking

The experience of other state courts certainly shows that in a best interests analysis (whether in an initial or modification proceeding), the issue of secondhand smoke should be considered as one among many factors either in the resolution of the custody and visitation dispute or in the issuance of an order protecting the child from exposure to secondhand smoke.¹¹³ As West Virginia has legal standards similar to that of those courts in other states which have addressed the secondhand smoke issue,¹¹⁴ the result in West Virginia should not vary dramatically from the experience of the other states.

VI. CONCLUSION

Based on the growing body of evidence documenting the dangers of secondhand smoke, courts and legislatures have protected many classes of adult nonsmokers from exposure to smoke. Protections have been extended to employees in the workplace, incarcerated convicts, and visitors of public buildings and places. However, little attention has been paid to that class of persons who have the least control over their exposure to the dangers of secondhand smoke — children. Fortunately, in the context of child custody and visitation disputes, some courts have intervened and have recognized the hazards of secondhand smoke to children, limiting a smoking parent's right to custody or visitation due to such unhealthy habit. With the increasing number of child custody and visitation disputes considering a child's exposure to a parent's tobacco smoking, the nation's family courts should soon extend to children the same protections they have already extended to adult nonsmokers. As evidenced by the survey of West Virginia's Family Law Masters, it is also only a matter of time until the Supreme Court of Appeals of West Virginia will have to address the secondhand smoke issue in visitation and custody disputes. Based on its prior pronouncements, the court should at a minimum find that the danger secondhand

issue before the trial court, it appears that the Supreme Courts of Appeals of West Virginia might have reviewed the issue.

113. See *supra* notes 58-84 and accompanying text.

114. See Uhlich, *supra* note 5, at 755 (wherein the author notes that all 50 states, either by statute or case law, determine custody decisions according to the best interests of the child).

smoke poses to children is sufficiently significant to be considered as a relevant factor in a decision-maker's review of the dispute. And in those cases where a child has a particular health problem aggravated by secondhand smoke, the court clearly should find exposure to secondhand smoke to be a determinative factor in the dispute. The court should not continue to ignore the deleterious impact secondhand smoke has upon the children of this state.

